

1 Christopher A. Seidl (*pro hac vice*)  
CSeidl@RobinsKaplan.com  
2 John K. Harting (*pro hac vice*)  
JHarting@RobinsKaplan.com  
3 **ROBINS KAPLAN LLP**  
4 800 LaSalle Avenue, Suite 2800  
Minneapolis, MN 55402  
5 Telephone: 612-349-8500  
Facsimile: 612-349-4181  
6 *Counsel for Defendants*  
7 INVT SPE LLC  
INVENTERGY GLOBAL, INC.

8 *Additional Counsel Listed on Signature Page*

10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**

13 INTEL CORPORATION and APPLE INC.,

14 Plaintiffs,

15 v.

16 FORTRESS INVESTMENT GROUP LLC,  
FORTRESS CREDIT CO. LLC, UNILOC  
17 2017 LLC, UNILOC USA, INC., UNILOC  
LUXEMBOURG S.A.R.L., VLSI  
18 TECHNOLOGY LLC, INVT SPE LLC,  
INVENTERGY GLOBAL, INC., and IXI IP,  
19 LLC,

20 Defendants.

Case No. 3:19-cv-07651-EMC

**DEFENDANTS INVT SPE LLC AND  
INVENTERGY GLOBAL, INC.'S  
SUPPLEMENTAL BRIEF IN SUPPORT  
OF DEFENDANTS' JOINT MOTION TO  
DISMISS AND TO STRIKE PLAINTIFFS'  
SECOND AMENDED COMPLAINT**

Hon. Edward M. Chen

**[REDACTED VERSION]**

1 In addition to the grounds raised in the joint motion to dismiss and strike, Plaintiffs’  
 2 remaining claims against INVT SPE LLC (“INVT”) and Inventergy Global, Inc. (“Inventergy”)  
 3 should be dismissed with prejudice as the claims fail to plausibly articulate that the alleged  
 4 supracompetitive licensing rates offered by INVT and Inventergy **resulted from** any purported  
 5 aggregation of substitute patents.<sup>1</sup> Plaintiffs’ Second Amended Complaint (“SAC”) is entirely  
 6 devoid of facts that would move such an allegation from possible to plausible. To the contrary, as  
 7 shown by the INVT/Inventergy licensing letters referenced in Plaintiffs’ SAC, the offered rates  
 8 were tied to specific standard essential patents and calculated to reflect INVT/Inventergy’s *pro*  
 9 *rata* (proportional) share of patents essential to the 3G and LTE standards. The rates were not  
 10 linked to any purported aggregation of substitute patents.

11 As this Court previously noted, a plaintiff’s “factual allegations [in the complaint]  
 12 ‘must . . . suggest that the claim has at least a plausible chance of success.’” *Levitt v. Yelp! Inc.*,  
 13 765 F.3d 1123, 1135 (9th Cir. 2014). Here, the Second Amended Complaint asserts a Section 1  
 14 claim against Inventergy, a Section 7 claim against INVT, and a Section 17200 claim against both  
 15 INVT and Inventergy. SAC ¶¶ 454-67. Each of the remaining claims are based on what this Court  
 16 previously dubbed Plaintiffs’ “Patent Aggregation Theory.”

17 As such, Plaintiffs must plausibly show that the alleged supracompetitive royalties were  
 18 offered or extracted “as a result of their aggregation.” Dkt. 229 at 24:11-12; *see also, e.g., id.* at 26  
 19 (“even if it could reasonably be inferred that the ‘014 patent was the driving force for the increase  
 20 in demand, there must still be a showing that the supracompetitive pricing **was the result of** the  
 21 ‘014 patent’s being aggregated with patents that provide the same function. The FAC lacks  
 22 specific allegations in this regard.”) (emphasis added); *id.* at 26-27 (“the differential **must**  
 23

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24 <sup>1</sup> Plaintiffs’ original Complaint and first Amended Complaint included two distinct liability  
 25 theories asserted against Defendants INVT and Inventergy, referred to by this Court as (1) the  
 26 “Patent Aggregation Theory” and (2) the “SEP Transfer Theory.” *See, e.g.* Dkt. 229 at 2. The SEP  
 27 Transfer theory, which was asserted in connection with Apple’s prior claim for unfair competition  
 28 in violation of § 17200, was dismissed with prejudice. *Id.* at 28. The Court also expressly noted  
 that Plaintiffs’ SEP Transfer Theory claim was “not based on predicated aggregation of patents.”  
*Id.* at 12-13. Thus, Plaintiffs now proceed against INVT and Inventergy only on Plaintiffs’ Patent  
 Aggregation Theory. SAC ¶¶ 454-67

1 *plausibly be attributable to the aggregation* of patent substitutes acquired by Defendants.

2 Plaintiffs have failed to make allegations tying the pricing differential to aggregation of the patents  
3 at issue.”) (emphasis added)). Plaintiffs’ SAC fails to meet this threshold.

4 Plaintiffs’ Patent Aggregation Theory remains the same as previously alleged: that as a  
5 result of aggregation, the Defendants are able to “seek and obtain far more for [licensing] their  
6 patents than the costs at which they acquired those patents or the rates at which they would have  
7 been licensed before aggregation eliminated competition.” SAC ¶ 447; *see also id.* at ¶ 88 (generic  
8 allegation against Inventergy of supracompetitive pricing based on aggregation); *id.* at ¶ 91 (same  
9 for INVT). In support of these allegations against INVT and Inventergy, Plaintiffs’ SAC cites  
10 to two letters, attached hereto as Exhibits 24 and 25 to the Declaration of Christopher A. Seidl.

11 First, a January 2015 letter from Inventergy to Apple offering to license certain standard  
12 essential patents then held by Inventergy to Apple for [REDACTED]  
13 [REDACTED] SAC at ¶ 128; Seidl Decl. Ex. 24.<sup>2</sup> Second, a June 2018 letter from INVT to  
14 Apple, which explained the methodology behind the January 2015 offer and [REDACTED]  
15 [REDACTED] *Id.* ¶ 130; Seidl Decl. Ex. 25. While neither letter was attached to Plaintiffs’ SAC,  
16 because Plaintiffs referenced the contents of the letters in the complaint, this Court may take  
17 judicial notice of the documents and their contents for purposes of this motion. *Dizon v. Wells*  
18 *Fargo, N.A.*, No. 12-CV-04623 NC, 2012 WL 6203008, at \*2 (N.D. Cal. Nov. 26, 2012) (a court  
19 may take judicial notice of “documents whose contents are alleged in a complaint and whose  
20 authenticity no party questions, but which are not physically attached to the pleading.”).<sup>3</sup>

21 Here, both letters show that INVT and Inventergy’s licensing offers were *not* a result of  
22 any alleged aggregation of substitute patents, but instead represent *pro rata* shares of the value of  
23 the 3G and LTE standards, calculated according to a “Top Down” methodology. The January 2015  
24 letter explains that [REDACTED]

26 <sup>2</sup> The January 2015 letter referred to in the SAC was incorrectly dated January 16, 2014.  
27 However, the SAC acknowledges the correct date is from January, 2015, and the date does not in  
any way impact the relevant substance of the letter.

28 <sup>3</sup> *See also* Request for Judicial Notice (“RJN”) filed concurrently herewith.

1 [REDACTED] Ex. 24 at 1. However, the [REDACTED]  
2 per unit royalty rate offered by Inventergy was *not* [REDACTED]

3 [REDACTED]  
4 [REDACTED] *Id.* at 1-2; *see also* Att. A thereto.

5 As Plaintiffs' SAC goes on to explain, in June 2018, after INVT acquired the Panasonic  
6 portfolio from Inventergy, INVT then [REDACTED]

7 [REDACTED].” SAC ¶ 130. INVT's June 2018 letter did in fact explain [REDACTED]

8 [REDACTED]  
9 [REDACTED]. Ex. 25 at 2-8.

10 As explained by the January 2018 letter, in calculating the offered rate Inventergy [REDACTED]

11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 Ex. 25 at 6.

21 A similar calculation was carried out for 3G, where [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 Ex. 25 at 8. [REDACTED]

2 [REDACTED]

3 [REDACTED] Ex. 25 at 9.

4 While Plaintiffs may disagree with many aspects of Inventergy's calculation, the only  
5 relevant data point for this Court's analysis in determining whether to dismiss Plaintiffs' claims,  
6 which are based on Plaintiffs' Patent Aggregation Theory, is whether the royalty rate was the  
7 result of the aggregation of substitute patents. Dkt. 229 at 26-27. As this Court already found in  
8 regards to Plaintiffs' SEP Transfer Theory (Dkt. 229 at 12-13), the answer to that question is  
9 undoubtedly "no." Instead, the INVT/Inventergy license letters actually show the opposite—that  
10 the offered rates were calculated according to a mathematical formula tied specifically to  
11 Inventergy's (and later INVT's) *pro rata* share of 3G and LTE standard essential patents.

12 Plaintiffs' SAC contains no allegations to the contrary, and entirely fails to connect the  
13 rates to any alleged aggregation of substitute patents. Indeed, Apple previously alleged that the  
14 patents at issue in the 2015 and 2018 letters were somehow part of a scheme by INVT/Inventergy  
15 to acquire and then assert standard essential patents while evading their corresponding FRAND  
16 commitments. *See* First Amended Complaint ¶¶ 394-427. The Court, however, dismissed this  
17 theory, and noted that it was "not based on predicated aggregation of patents." Dkt. 229 at 12-13,  
18 27-28. Plaintiffs attempt to shoehorn their previously dismissed "SEP Transfer Theory" into their  
19 "Patent Aggregation Theory" should be rejected

20 All three of Plaintiffs' claims against INVT and Inventergy rise and fall based on  
21 Plaintiffs' ability to plausibly assert that the rates offered by INVT/Inventergy were the result of  
22 aggregation of substitute patents. Plaintiffs fail to meet that burden. Plaintiffs' claims against  
23 INVT and Inventergy must be dismissed with prejudice. *See Cook, Perkiss & Liehe, Inc. v. N. Cal.*  
24 *Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (leave to amend is inappropriate when  
25 "the pleading could not possibly be cured by the allegation of other facts.").

1 Dated: April 26, 2021

Respectfully submitted,

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ROBINS KAPLAN LLP

By: /s/ Christopher A. Seidl

Christopher A. Seidl (*pro hac vice*)

CSeidl@RobinsKaplan.com

John K. Harting (*pro hac vice*)

JHarting@RobinsKaplan.com

Taylor Moore-Willis (*pro hac vice*)

TMoore-Willis@RobinsKaplan.com

**ROBINS KAPLAN LLP**

800 LaSalle Avenue, Suite 2800

Minneapolis, MN 55402

Telephone: 612 349 8468

Facsimile: 612 339-4181

*Counsel for Defendants*

INVT SPE LLC

INVENTERGY GLOBAL, INC.

Steven Carlson

SCarlson@RobinsKaplan.com

**ROBINS KAPLAN LLP**

2440 West El Camino Real, Suite 100

Mountain View, California 94040

Telephone: (650) 784-4012

Facsimile: (650) 784-4041

William V. Reiss (*pro hac vice*)

WReiss@RobinsKaplan.com

**ROBINS KAPLAN LLP**

399 Park Avenue, Suite 3600

New York, NY 10022

Telephone: 212-980-7400

Facsimile: 212-980-7499

*Counsel for Defendants*

INVT SPE LLC

INVENTERGY GLOBAL, INC.